No. 10998

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA AND SOCIAL SECURITY BOARD, APPELLANTS

v.

AUGUSTA J. LALONE, ON BEHALF OF JULIE S. LALONE, JANET D. LALONE, JILL R. LALONE, AND LANCE D. LALONE, APPELLEES

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLANTS AND APPENDIX

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10998

United States of America and Social Security Board, appellants

v.

Augusta J. LaLone, on Behalf of Julie S. LaLone, Janet D. LaLone, Jill R. LaLone, and Lance D. LaLone, appellees

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLANTS AND APPENDIX

JURISDICTIONAL STATEMENT

The action was instituted in the United States District Court for the Eastern District of Washington against the United States and the Social Security Board to review, pursuant to Section 205 (g) of the Social Security Act as amended (42 U. S. C. § 405 (g)) a denial of child's insurance benefits. A motion to dismiss the action as to the defendant United States as in violation of Section 205 (h) (R. 8) was

not acted upon by the District Court.[1] The jurisdiction of this court to review the order of the District Court is sustained by Section 205 (g) of the Social Security Act, as amended, and Section 128 of the Judicial Code (28 U. S. C. § 225).

STATEMENT OF THE CASE

This is an appeal from an order and final judgment of the United States District Court for the Eastern District of Washington, entered December 22, 1944, denying the motion of the defendant Social Security Board for summary judgment and for judgment affirming the decision of the Social Security Board complained of in the action; granting plaintiff's cross-motion for summary judgment; and reversing the decision of the Social Security Board (R. 33–35). The order and final judgment adjudges that plaintiff's children are entitled to child's insurance benefits under the Social Security Act, based upon the status of their father, Dwight J. LaLone, as an insured individual at the time of his death, and directs the Social Security Board "to certify to the Managing Trustee the names and addresses of the parties plaintiff herein as entitled to receive" such benefits.

The decision of the Social Security Board (Tr. 2, 8–13 [2]) reversed by this judgment found that from

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[1] In view of the fact that consent to sue the United States is expressly withheld by Section 205 (h) of the Social Security Act as amended (42 U. S. C. § 405 (h)) and that no order was entered against the United States, the manifest jurisdictional defect in retaining the United States as a party to the proceeding will not be noticed further.

[2] References to the printed record will be abbreviated R. * * * References to the photoprint transcript of the administrative pro-

August 1938 to May 1942, LaLone was an entrepreneur having a proprietary interest in the Barrett-LaLone Insurance Agency and not in covered employment under the Social Security Act. Exclusive of this period he could be neither "fully insured" (Section 209 (g) of the Social Security Act as amended) nor "currently insured" (Section 209 (h) of the Social Security Act as amended). Consequently his children were not entitled to child's insurance benefits (Section 202 (c) of the Social Security Act as amended).

A. The administrative proceedings

Dwight J. LaLone died on November 20, 1942. On December 7, 1942, plaintiff filed application under Title II of the Social Security Act as amended (53 Stat. 1362, 42 U. S. C. §§ 401 et seq.) for child's insurance benefits (Section 202 (c) of the Act as amended, 42 U. S. C. Section 402 (c)) on behalf of four infant children. On February 19, 1943, the Bureau of Old-Age and Survivors Insurance of the Social Security Board denied the application on the ground that he was not an employee of F. S. Barrett & Co., and did not qualify as a fully or currently insured individual. As permitted by the regulations, plaintiff requested reconsideration. On reconsideration, it disallowed the claim on April 26, 1943, con-

ceedings will be abbreviated Tr. * * * Pursuant to the order of this court dated March 8, 1945, the printing of the transcript of the proceedings before the Board has not been required. Photoprint positive copies have, however, been furnished to the clerk of this court. References to specific pages of the transcript will be to the handwritten numbers appearing near the top of the outside margin.

cluding that LaLone "was a party to a joint venture and, therefore, self-employed rather than an employee" (Tr. 113–114). Disagreeing with the determinations, plaintiff requested and was given a hearing before a referee of the Social Security Board. The evidence before the referee at the hearing on November 15, 1943, including the testimony of plaintiff and three other witnesses in her behalf, may be summarized as follows: [3]

For some time prior to August 1, 1938, LaLone operated an insurance business that dealt in all forms of insurance except life, under the name of the D. J. LaLone Insurance Agency (Tr. 24–25). He was then indebted to several insurance agencies to the extent of more than two thousand dollars. His accounts were worth $3,600 (Tr. 57–58). To protect his representation, he approached F. S. Barrett & Co., for whom he had once worked. F. S. Barrett & Co. was primarily a realty company but it had a small, unprofitable insurance business. (Tr. 36). F. S. Barrett & Co. took LaLone's notes and advanced the money with which to meet his obligations on promissory notes payable in a year (Tr. 39–40, 55–56, 120–123).

The two separate insurance businesses were pooled as the Barrett-LaLone Insurance Agency (Tr. 40, 50). LaLone moved his office to the real estate office of F. S. Barrett & Co., taking his stenographer and some of his office furniture with him (Tr. 25, 29–30, 42), together with his insurance accounts, far exceed-

[3] The evidence is summarized in the referee's decision, Tr. 8–12.

ing the F. S. Barrett & Company's insurance business in value (Tr. 36). A bank account in the name of Barrett-LaLone Insurance Agency was established for the handling of all receipts and disbursements of the Agency. All checks had to be signed by LaLone and either F. S. Barrett, Sr., or F. S. Barrett, Jr., president and secretary, respectively, of the Barrett Co. (Tr. 40–41). Loans were obtained on two signatures, LaLone's and one of the Barretts' (Tr. 51–52). The insurance operations were virtually the exclusive concern of LaLone. Separate accounts and stickers on the business originating with each constituent were maintained (Tr. 43–44, 66).

No formal agreement was ever executed. In an unsigned agreement (Tr. 116–119) which completely embodied and *"clearly reflected"* the terms of the arrangement (Tr. 38–39) F. S. Barrett & Co. was given an option to buy a one-half interest for $1,800 after repayment of its loan to LaLone, if the parties should then decide to continue the Barrett-LaLone Insurance Agency. That agreement recited the desire of the parties to consolidate their insurance businesses and to "form a new insurance agency as of the first day of August 1938, to be known as the Barrett-LaLone Insurance Agency, the business of which shall be conducted in the office of the first party (F. S. Barrett & Co.) under the general management of the second party (LaLone) in which agency the first and second party shall have an equal interest, and the second party shall devote his entire time to the business of said insurance agency." The advances

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were not to exceed $2,148. LaLone was to receive $200 a month out of net profits, and the Agency was to "continue for the period of one year, or until such further time as all advances by the first party have been repaid, at which time the parties hereto agree that said Agency may be dissolved or may be continued, in the discretion of either party, and if it is decided to continue said Agency, the first party shall pay to the second party the sum of Eighteen Hundred Dollars ($1,800.00) and shall thereupon own a one-half interest in said Agency. Upon a dissolution of said Barrett-LaLone Insurance Agency each of the parties hereto shall hold as his own all insurance business turned over to said Agency by him and all new business brought to said Agency by him * * *." (Tr. 118).

All profits realized from the business were to be applied to the payment of LaLone's notes. Thus the profits on the insurance business derived from the F. S. Barrett & Co.'s accounts (which had never been lucrative, Tr. 36) would also be applied in payment on the notes. The Barrett Company was looking to a "built-up insurance business eventually" (Tr. 47) as its inducement and consideration. During the pooling F. S. Barrett & Co. returned only part of the profit as income. It was at LaLone's instance that "partnership" profits were so returned (Tr. 73–74).

> F. S. Barrett, Sr. He said in order to keep things straight we should show this partnership that there was a profit there to our account.

As far as receiving anything, we never received a cent. That was a matter of bookkeeping.

REFEREE. But you considered that you had an interest in the profits of that agency?

F. S. BARRETT, Sr. Yes.

REFEREE. Despite the terms of that agreement whereby he was to receive all the profits?

F. S. BARRETT, Sr. Yes. Well, it was 50–50. He showed so much profit, and then we added it up 50 to us and 50 to him. I think it was on our books too.

A separate charge was made by F. S. Barrett & Co. to Barrett-LaLone Insurance Agency for rent and telephone (Tr. 45). The charges for "office rent and phone rent" were paid currently by the Agency to the Company (Tr. 51). LaLone was allowed $200 a month out of net profit (Tr. 74), paid by check from the Barrett-LaLone account. On several occasions when the Barrett-LaLone Insurance Agency had insufficient funds in its bank account to pay LaLone's drawing, money was borrowed from the bank upon the note of the Insurance Agency, signed by LaLone and one of the Barretts and repaid out of subsequent profits of the Agency; on just one occasion F. S. Barrett & Co. advanced a small amount to Barrett-LaLone (Tr. 51–52).

The Barrett-LaLone Insurance Agency maintained its own records, which LaLone took with him upon dissolution of the Agency (Tr. 129). Its affairs were not reflected on the books and records of F. S. Barrett & Co. other than to show the loan to LaLone and other

transactions between the Agency and the corporation (Tr. 50–51). The Agency was publicly held out as a distinct firm. It had its own bank account and advertised the business in the name of the Agency. Contracts for calendars and billboards to advertise the Agency (not the corporation) were signed by LaLone on behalf of the Agency (Tr. 42–43). Barrett, Sr., testified that the Agency account was still open for the deposit of collections on bills outstanding and that plaintiff as administratrix had an interest in realizations (Tr. 61–63).

Barrett, Jr. considered that LaLone "was acting as the manager of the insurance business." He was thereupon asked by the referee: "As your employee?" Whereupon Barrett, Sr., interjected: "No" (Tr. 56). Barrett, Jr., did not take issue.

In May 1942, without consulting the Barretts, LaLone sold his business to the Vermont Loan & Trust Co. for $5,000, paying the notes held by the Barrett Co. out of the purchase price. The buyer took over all the insurance accounts LaLone brought to Barrett-LaLone and those he had developed; the remainder reverted to the F. S. Barrett Co. (Tr. 31–32, 47–48, 58, 129).

One week before the dissolution of the Barrett-LaLone Insurance Agency, LaLone wrote the Bureau of Internal Revenue (Tr. 124, Exhibit X) with reference to employer's identification numbers:

> We have what is known as Barrett-LaLone Insurance Agency, and the owners are F. S. Barrett & Co. and D. J. LaLone, and this is an entirely separate organization. Therefore, there

should be a number for the Barrett-LaLone Insurance Agency and also for F. S. Barrett & Co.

Social Security tax reports for the years prior to 1942 were not filed. No returns have ever been filed listing LaLone as an employee of F. S. Barrett & Co., of the Barretts individually, or of Barrett-LaLone Insurance Agency, except that he was listed in tax returns (Tr. 76; 125–129, Exhibit Y) by Barrett-LaLone Insurance Agency for the quarter ended March 31, 1942, and for the second quarter up to May 15, 1942, to which LaLone attached a statement (Tr. 129, part of Exhibit Y) reading as follows:

> The partnership of the Barrett-LaLone Insurance Agency was dissolved as of May 1, 1942. The salary of Dwight J. LaLone ceased on that date, but Dorothy May Ebeling was paid wages until May 15, 1942.
>
> The records of the Barrett-LaLone Insurance Agency are kept by D. J. LaLone, at 1114 Old National Building, Spokane, Washington.

Taxes in connection with these two quarters, the only two filed, were paid out of the Barrett-LaLone Insurance Agency funds (Tr. 70).[4]

Prior to August 1, 1938, LaLone was admittedly self-employed and no contention to the contrary has been advanced. His employment with the Vermont

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[4] After the filing of plaintiff's application, a statement was made out on January 15, 1943, on Social Security Board Form OAC–1001, in the course of the usual administrative inquiry of each alleged employer, signed "Barrett-LaLone Ins. Agency by F. S. Barrett," and filed with the Board, purporting to show wages paid LaLone commencing in the third quarter of 1938 and ending May 1, 1942 (Tr. 93, 95, 99).

Loan & Trust Company from May 1 to November 20, 1942, would yield only three quarters of coverage[5] of the 11 quarters of coverage after December 31, 1936, that would be needed for fully insured status (Section 209 (g) of the Act as amended) (Tr. 113–114)[6] and only two of the twelve calendar quarters immediately preceding the quarter in which LaLone died of the six required for currently insured status (Section 209 (h) of the Act as amended) (Tr. 113). Entitlement to child's insurance benefits is conditioned upon the wage-earner's having died a fully or currently insured individual. Unless the decedent was in covered employment during the continuance of the arrangement with F. S. Barrett & Co., he could not have been fully or currently insured.

On these facts the referee denied the claims on December 20, 1943. He found that "LaLone was not an employee, but as a member of a partnership or joint venture was an employer" (Tr. 12), and that "LaLone owned a proprietary interest in the Barrett-LaLone Insurance Agency, and therefore could not be an employee thereof" (Tr. 13).

Plaintiff thereupon appealed to the Appeals Council of the Social Security Board. On March 11, 1944, the Council affirmed the decision of the referee and adopted his findings and decision as its own (Tr. 2).

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[5] Quarters in which he was paid wages of $50 or more in covered employment.

[6] After 1936 and up to but excluding the quarter in which he died there were twenty-three quarters. Half must be quarters of coverage. Since the number of quarters (23) is odd, the number is reduced by one before division. Section 209 (g); Regulation 3 of the Social Security Board, Section 403.201 (c) (1).

In conformity with the practice of the Social Security Board the decision of the Appeals Council became the final decision of the Board.

B. The proceedings in the district court

Thereafter and within the time permitted by Section 205 (g) of the Social Security Act as amended (42 U. S. C. § 405 (g)) plaintiff commenced this action in the district court to review and set aside the decision of the Social Security Board (R. 2–4). The Board answered the complaint (R. 9–12) and pursuant to the requirements of Section 205 (g) filed as part of its answer a certified transcript of the administrative record (R. 11).

Section 205 (g) of the Act as amended does not contemplate a trial *de novo.* It provides that the reviewing court "shall have power to enter upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Board." It further provides that the findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive.

In view of the limited nature of judicial review in proceedings under Section 205 (g) and the fact that the record before the court consists only of the pleadings and the administrative transcript, it has been the practice of the Social Security Board to move for summary judgment pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure as soon as issue is joined. *Walker* v. *Altmeyer,* 137 F. (2) 531 (C. C. A. 2); *Morgan* v. *Social Security Board,* 45 F. Supp. 349 (M. D. Pa.); cf. *National Broadcasting Co.* v. *United*

States, 319 U. S. 190, 227. Such practice was followed in this case (R. 12–13). The plaintiff cross-moved for summary judgment in her favor (R. 32–33).

C. The decision of the district court [7]

The district court in an extended opinion (R. 15–32) reversed the Board's determination as without basis in law and without warrant in the record, and following closely plaintiff's analysis of the alleged facts (Tr. 4–6), stated that "It would require the most tortuous interpretation of the statute and regulation to conclude other than that LaLone was an employee." Apparently referring to Section 209 (b) (1)–(15) of the Act as amended (42 U. S. C. 409 (b) (1)–(15)), the court said:

> The restriction upon the coverage does not stem from the language Congress used in defining "employer," "employee," or "employment." It is the result of fifteen restrictive exceptions withholding from coverage certain specific classes of workers.

The court purported to follow the pertinent regulations but inadvertently cited Treasury Regulations 90 and 91, applicable to the tax provisions, instead of Social Security Board Regulations 2 and 3. The court reasoned as follows:

1. The referee did not refer to the provision, found in the Treasury and Board regulations defining employment status, that "If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than

[7] Reported in 57 F. Supp. 947.

that of employer and employee is immaterial," and "totally ignored" the applicable regulation. He ignored the Barretts' alleged right to control, but stressed the infrequency of its exercise; he ignored the Barretts' right to terminate the relationship "on their own volition"; he ignored the fact that the Barretts furnished the office space.

2. The referee "ignored the broad aspects of the statute with the administration of which this agency is charged." In violation of the Supreme Court's command in *Labor Board* v. *Hearst Publications,* 322 U. S. 111, the referee gave the Act "inhospitable scope."

3. The referee's findings handled the facts inexpertly and without comprehension, laying undue stress on the unsigned written proposal. To people versed in the ways of business, the evidence established an employee relationship. The contrary view of the referee was ascribed to inexperience, impracticality, and a "restricted field of vision."

On December 22, 1944, the court granted plaintiff's motion for summary judgment and directed the Board to certify to the Managing Trustee the names of the infants as entitled to receive child's insurance benefits.

SPECIFICATION OF ERRORS RELIED UPON

The district court erred—

(1) In failing to hold that the Social Security Board's finding that decedent was self-employed, a joint venturer in the insurance business, not an em-

ployee, was supported by substantial evidence and conclusive.

(2) In holding that the Social Security Board had applied an improper rule of law, had failed to follow *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, and had ignored the applicable regulation in determining LaLone's employment status for Title II purposes.

(3) In failing to give any weight to the evidence supporting the Social Security Board's findings, but instead, substituting the court's own inferences and evaluation of the evidence for the Board's.

STATUTES AND REGULATIONS INVOLVED

For the convenience of the court the statutes and regulations herein involved are set forth in an appendix hereto (pp. 45–50, *infra*).

QUESTIONS PRESENTED

The only questions presented on this appeal are (1) was the administrative determination on the undisputed facts that LaLone was self-employed and not in the employ of another so erroneous as to permit the district court to say that as a matter of law it was not supported by substantial evidence and to go on and to make substituted findings of its own, and (2) was the district court justified in imposing its own views of coverage upon the Board as a matter of law.

It is submitted that in administering the Act, the Board has constantly refused to permit its coverage determinations to be dominated by restrictive common law tests for ascertaining the master and servant relation but that, adopting the most liberal construction,

entrepreneurs are not within the ambit of the Social Security Act, and LaLone unquestionably fell in the ranks of the self-employed, as a working partner or joint venturer; that the *Hearst* case, 322 U. S. 111, and the regulations afford no open sesame to coverage for LaLone and other self-employed individuals. Indeed, the necessity for more expansive tests to cover those not comprehended by common law tests assumes the continuance of groups not satisfying the more inclusive tests of employee status. The *Hearst* case clearly has not forced abandonment of all standards for coverage determination in benefit proceedings. Even if it be deemed to establish the rule of the most liberal construction, it would still leave room for the agency to which administration is confided to determine that a particular individual was a self-employed working partner or coadventurer not rendering services for, and not in the employ of, another.

SUMMARY OF ARGUMENT

1. The differences are misconceived if they are laid to divergent views as to the scope of coverage under the Social Security Act rather than as to application. Long before the decision by the Supreme Court in the *Hearst Publications* case, concepts substantially the same as Mr. Justice Rutledge's had been adopted by the Social Security Board. The Board disclaims as a ground for appeal any reliance on narrow views of coverage.

Contrary to intimations in the opinion below, the terms "employment," "employer," and "employee" connote an exclusion of those not qualifying as em-

ployees by the tests applied by the Board. A rule of liberal construction is not in itself decisive of status in specific instances. Unreserved acceptance of all the implications of the *Hearst* case does not predetermine employee status for a co-owner of a business. The court fallaciously interpreted the *Hearst* case as virtually obliterating the distinction between persons in the employ of another and the self-employed. Actually, while the Supreme Court recognized that the class of employed persons might be viewed expansively by an administrative agency, it did not require the agency to lose sight of the limitations upon coverage attributable to the implicit restriction to those in an employment status, wholly apart from more specific exclusions.

2. Appraising the evidence, the Board found that decedent was self-employed. That finding was supported by substantial evidence before an agency well-grounded in the correct principles to be applied. By the standard of substantial support in the evidence, the Board's finding must be upheld. Actually it is supported by the great preponderance of the evidence. The court below, however, chose to search the record for evidence to support its own theory of the relationship, to make unwarranted assertions as to the evidence, to select particular excerpts from the regulations, and in so doing to tax the Board with failing to adhere to the precepts of the *Hearst* case and the regulations. By those very precepts, nevertheless, LaLone must be found to have been self-employed and, therefore, not in covered employment during the

critical period from August 1938 to May 1942. The *Hearst* case requires that the administrative agency's determination be accepted if it has "warrant in the record and a reasonable basis in law."

3. Particularly with respect to a program of such vast proportions as the Old-Age and Survivors Insurance program, intrusion by the courts, and the substitution of judicial disposition for that of the administrative body, should be discountenanced. The courts, dealing with these cases sporadically, do not share the advantages of familiarity with the background and knowledge of the practical consequences that will ensue from any particular construction. Reversal of the Social Security Board may only be justified when the Board's findings of fact are unsupported by evidence, or when it has applied the wrong principle of law. In the case at bar, the Board has manifestly applied the correct principles, and adhered to its own regulations. In no sense was there any error of law. The only question is whether the Board is to be permitted to apply fair tests of coverage (and noncoverage) even when its finding results in a denial of benefits.

POINT I

The Board was warranted in determining that persons sustaining the relation to a business that LaLone did in the instant case are not wage earners under the Social Security program

Entitlement and benefits payable under the Old-Age and Survivors Insurance program are determined and measured by wages paid. "Wages" are defined as

"remuneration for employment." (Section 209 (a) of the Act as amended, 42 U. S. C. 409 (a)). "Employment" is defined as "any service * * * performed * * * by an employee for the person employing him." (Section 209 (b) of the Act as amended, 42 U. S. C. 409 (b)). (Prior to January 1 1940, it was defined as "any service * * * performed * * * by an employee for his employer.") Self-employed individuals are not within the scope nor within the intention. They are not in receipt of remuneration for services performed in the employ of another; they work for themselves. Apart from their definitional exclusion, self-employed individuals are commonly regarded as typically better able to protect themselves from the hazards of insecurity and their earnings as being highly differentiated, in character and amount, from the wages of industrial workers receiving periodic remuneration while employed. *Ridge Country Club* v. *United States,* 135 F. (2) 718 (C. C. A. 7). It is no new discovery that their "economic situation may not be one whit better than that of many workers covered by the compulsory system." Report of Committee on Economic Security (1935) p. 35.

> A considerable part of the population, however, is outside of Title II. Included in this excluded group are all agricultural workers, domestic servants, employees of charitable, educational and religious organizations, *all self-employed persons,* farmers, professional people and proprietors and entrepreneurs. These

groups include almost half of all persons "gainfully occupied" as this term is used in the United States Census. Senate Report No. 628, on H. R. 7260, which became the Social Security Act of 1935, 74th Cong., 1st Sess., p. 9. [Italics supplied.] [8]

The Social Security Board in its Eighth Annual Report, 1943 (p. 14) recognizes the desirability of extending coverage:

> Self-employed persons are often thought of in terms of well-to-do business and professional men whose work is "independent." Yet the 10.0–11.7 million persons excluded from substantially all participation in social insurance by reason of their self-employment represent for the most part operators of small farms and stores, repair services, and the like, whose returns are small and whose "independence" is largely illusory * * *
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> Letters received by the Board indicate that many owners of little unincorporated businesses look longingly at the protection which wage earners have under the Social Security Act and other social insurance legislation. Often they are contributing under such laws in behalf of their employees while they themselves have no

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[8] See also computations and tables in Report No. 628 of Senate Committee on Finance, May 13, 1935 (to accompany H. R. 7260), pp. 26, 27, and Report No. 615 of House Committee on Ways and Means, April 5, 1935 (to accompany H. R. 7260), pp. 14, 15, which indicate that in addition to the specially excluded types of service, it was intended that the individuals not within the coverage of title VIII and title IX of the original act would be "owners, operators, self-employed (including the professions)."

> adequate means of making provision for their old age or assuring the support of their families if they should die.[9]

Not to belabor the point, the court below cited as the best statement of the objectives of the Social Security Act, the testimony of Senator Wagner on his unenacted bill, S. 1130, before the Senate Committee on Finance on January 22, 1935 (See Hearings, Economic Security Act, Committee on Finance, 74th Cong., 1st Sess. S. 1130). Senator Wagner said at p. 2 (the court's page reference) that "Lost profits may be regained upon the upward swing of the business cycle, but the working day that is lost is gone forever," and specifically noted (p. 8) "The compulsory national system of old-age insurance will not provide for those who engage in business for themselves."

The concept of the exclusion of the self-employed was basic. It never occurred to Congress that any one would contend that persons who were self-employed would be entitled to the same social security benefits[10] (or liable for the Federal Insurance Con-

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[9] "The statute does not comprehend storekeepers, professional men engaged in making their own livelihood, profiting or losing from the exercise of their own judgment, capital, and enterprise." *Ridge Country Club* v. *United States*, 135 F. (2) 718 (C. C. A. 7); *Whalen* v. *Harrison*, 51 F. Supp. 515 (N. D. Ill.); *Nevins* v. *Rothensies*, 58 F. Supp. 460 (E. D. Pa.)

[10] As a supplement to the system applicable to wage-earners it was originally planned to *sell* deferred life annuities to individuals on a cost basis. In its Report to the President (1935) the Committee on Economic Security, p. 5, stated that "The primary purpose of the plan is to offer persons not included within the compulsory system a systematic and safe method of providing for their old age." This plan, devised to take in the self-employed,

tributions tax on employees, 26 U. S. C. § 1400) as those employed by another. In view of the foregoing, appellants must take exception to the statement of the court below that "The restriction upon the coverage does not stem from the language Congress used in defining 'employer,' 'employee,' or 'employment.' It is the result of fifteen restrictive exceptions withholding from coverage certain specified classes of workers." As the Board has said (Social Security Yearbook, 1941, p. 51): "Coverage under the old-age and survivors insurance program is based on 'employment,' and services in employment can be rendered only by 'employees.' But not all services rendered by employees constitute 'employment' as that term is defined in title II of the Social Security Act." See also Social Security Yearbook for the calendar year 1942 (June 1943), p. 26, Table 8.[11]

The cases interpreting the Social Security Act and related social legislation have recognized that people in business for themselves, whether operating as sole proprietors or as co-proprietors in a partnership or

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was embodied in title XI of H. R. 7260. It was not, however, enacted as a part of the Social Security Act of 1935. In its recommendations on unemployment compensation (p. 10) the Committee noted that "Even with compulsory coverage large groups of workers cannot readily be brought under unemployment compensation; among them employees in very small establishments, *and, of course, all self-employed persons.*" See also Senate Report No. 628, 74th Cong., 1st Sess., pp. 3, 9–10, 52.

[11] Neither "employer" nor "employee" is specifically defined in the Social Security Act. See *Independent Oil Co.* v. *Fly*, 141 F. (2) 189 (C. C. A. 5); *Spillson* v. *Smith*, 147 F. (2) 727 (C. C. A. 7); *Los Angeles Athletic Club* v. *United States*, 54 F. Supp. 702, 704 (S. D. Calif.).

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joint adventure, are not covered. See *Sweet* v. *Bureau of Old-Age and Survivors Insurance,* decided August 31, 1942, United States District Court for the District of Idaho, C. C. H. Unemployment Insurance Service, Vol. 1, Fed. Par. 6348.21; *Sharp* v. *United States,* United States District Court for the District of Florida, decided January 21, 1942, C. C. H. Unemployment Insurance Service, Vol. 1, Fed. Par. 5054.511; C. B. XV–2, 405, S. S. T. 23; *Industrial Commission* v. *Bracken,* 83 Colo. 72, 262 Pac. 521; *Gibson-McPherson-Sutter Live Stock Co.* v. *Murphy,* 384 Ill. 414, 51 N. E. (2) 514; *Dezendorf* v. *National Casualty Co.,* 171 So. 160 (La. Ct. App.); *Auten* v. *Michigan Unemployment Compensation Commission,* — Mich. —, 17 N. W. (2) 249; *Chambers* v. *Macon Wholesale Grocer Co.,* 334 Mo. 1215, 70 S. W. (2) 884; *Skouichi* v. *Chic Cloak & Suit Co.,* 230 N. Y. 296, 130 N. E. 299; *Lyle* v. *H. R. Lyle Cider Co.,* 243 N. Y. 257, 153 N. E. 67; *Coccaro* v. *Herman Coal Co.,* 145 Pa. Super. 81, 20 Atl. (2) 916; *Peterson* v. *Department of Labor & Industries,* 160 Wash. 454, 295 Pac. 172; cf. *Estate of Tilton,* 8. B. T. A. 914, 917.

The Social Security Board may not be said to have accepted restrictive common law views. In the Social Security Yearbook for the calendar year 1940 (June 1941), pp. 74–75, the Board candidly rejected the approach of respondeat superior:

> In the field of social insurance the only control which appears to be relevant is general economic control and the dependence of an individual for his livelihood upon the person claimed to be the employer. It is somewhat

> incongruous that rights and liabilities under a modern program designed to protect individuals from insecurity in old age or to help bridge the gap between jobs—problems which are peculiarly the product of current forms of industrial organization—should be determined by any concepts which originated in the nineteenth century. In such a program the only individuals who could logically be excluded on the basis of their general status are the self-employed or those who are engaged in operating independently established businesses.

See also Social Security Yearbook for the calendar year 1941 (June 1942) pp. 47–52. But the Board cannot remain unaware that no matter how broad the coverage of "employees" may be, the need for deciding whether the individual is in the employ of another is not obviated. Indeed, far from dispensing with decision of that question, more recent cases have accentuated its importance by giving the "independently established" test greater emphasis than the delusively simple and telescoped "control test." The control test was formerly applied pretty much as a matter of course,[12] with the completely unpredictable results that might be anticipated from a test dependent on the distinction between *result* and *details and means*. Cf. *McGowan* v. *Lazaroff,* C. C. A. 2, March 26, 1945, C. C. H. Unemployment Insurance Service, Vol. 1, Fed. Par. 9186. It is perhaps significant that in its footnote 1, quoting Treasury Regulations 90 and 91 on employment, the court below

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[12] See Social Security Yearbook (1940), p. 76.

(which took the referee to task for not referring to a portion of the regulation) omitted the following paragraphs:

> Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.
>
> Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

N. L. R. B. v. *Hearst Publications,* 322 U. S. 111, implements the important role that the legislative purpose must play in the establishment of the boundaries of coverage by endowing the administrative agency with power to effectuate the objectives of the Act. It is the very opposite of a mandate to reject the well-settled distinction between employees and the self-employed. "Independent contractor" may be ambiguous—it may be used to describe employer or employee because generically it excluded only *servants* at common law, a narrower conception than employees. But the term "employee" cannot absorb the "self-employed."[13] The *Hearst* case itself dealt with the

[13] See Social Security Yearbook, 1941, p. 49 "* * * insofar as tort or workmen's compensation liability is concerned, use of the term 'independent contractor' as the antithesis of 'employee' probably does not seriously affect the validity or desirability of the legal conclusion reached in most cases. Experience has made it manifest, however, that serious consequences flow from the

problem of cases "in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing" (p. 121) and Justice Rutledge stated at p. 124 (with reference to the Labor Act):

> Congress had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally "employment," by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment.

The controversy between the parties to this appeal is not over a pure question of law. Whether a co-ownership or an employer-employee relation exists is a question of fact. *Walling* v. *Plymouth Mfg. Co.,* 139 F. (2) 178 (C. C. A. 7) affirming 46 F. Supp. 433

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transfer of these concepts to a system of old-age and survivors insurance which seeks to secure wage earners and their dependents against the economic consequences of old age and death. In this program the extent and nature of the control reserved or exercised over the individual who performs the service would seem to be a factor of no great relevance in ascertaining whether he should be covered. The proper inquiry would seem to be whether he was a wage earner dependent upon the continuance of an economic association with one whose business was furthered by the services he performed * * * Without prejudice to the view that coverage of the 'self-employed,' on economic and legal grounds, may be amply justified, it would seem that the initial inclusion of all gainful workers excepting self-employed individuals (and certain special groups) apart from considerations of tort liability is reasonable * * *"

(N. D. Ind.) cert. den. 322 U. S. 741; *San Francisco Iron & Metal Co.* v. *American Milling Co.,* 115 Cal. App. 238, 1 P. (2) 1008, 1011 (joint venture); *Ryder* v. *Jacobs,* 196 Pa. 386, 46 Atl. 667 (partnership); *Wyoming-Indiana Oil Co.* v. *Weston,* 43 Wyo. 526, 7 Pac. (2) 206, 208 (joint venture). The issue is whether, having regard to all the complex of attributes of the relationship of LaLone to the Barrett-LaLone Insurance Agency, and to all the characteristics of the Agency, the court below could say as a matter of law that LaLone had no proprietary interest in the Agency, but instead was merely an employee of a distinct entity of which he was not a member, with assurance that a contrary view was altogether unsound and unsupportable. So long as substantial evidence may be shown for holding that an individual was in entrepreneurial enterprise as a co-owner, that situation does not obtain. It is significant that the court did not specify who the employer was, whether (1) F. S. Barrett & Co., (2) the Barretts individually, or (3) Barrett-LaLone Insurance Agency.

The *Hearst* case does not relieve the trier of fact from coming to an over-all judgment on the facts and circumstances (*United States* v. *Aberdeen Aerie, No. 24,* decided by this court on February 16, 1945, C. C. H. Unemployment Ins. Service, Vol. 1, Fed. Par. 9177; *Anglim* v. *Empire Star Mines,* 120 F. (2) 914, 917 (C. C. A. 9)) nor does it establish any presumption of coverage militating against giving appropriate effect to the judgment and primary jurisdiction of the administrative agency. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 130.

Neither this court (see *Anglim* v. *Empire Star Mines,* 129 F. (2) 914; *Matcovich* v. *Anglim,* 134 F. (2) 834, cert. den. 320 U. S. 744; cf. *N. L. R. B.* v. *Long Lake Lumber Co.,* 138 F. (2) 363 (C. C. A. 9); *Emard* v. *Squire,* 58 F. Supp. 281 (W. D. Wash.)) nor any Circuit Court, certainly not the Fourth Circuit in *United States* v. *Vogue, Inc.* (145 F. (2) 609, cited by the court below, involving a seamstress in a Lynchburg store and her helpers) has attributed such breadth to the Social Security Act's coverage. The court below stands alone in purporting to find that the scope is intrinsically, and apart from administrative construction, so far reaching. The cases have almost uniformly justified denials of coverage on the basis of the applicable regulations' adoption of concepts not too remote from those of the common law, referring to the contrast in the regulations between employees and independent contractors.[14] The Act has been interpreted judicially for almost ten years without any intimation that "employment" *as a matter of law* included persons in LaLone's situation.

Notwithstanding its liberal approach, the district court's intrusion into the administration of the Social

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[14] See, e. g., *Texas Co.* v. *Higgins*, 118 F. (2) 636 (C. C. A. 2); *Radio City Music Hall Corp.* v. *United States*, 135 F. (2) 715 (C. C. A. 2); *Glenn* v. *Beard*, 141 F. (2) 376 (C. C. A. 6); *United States* v. *Mutual Trucking Co.*, 141 F. (2) 655 (C. C. A. 6); *Anglim* v. *Empire Star Mines*, 129 F. (2) 914; cf. *Emard* v. *Squire*, 58 F. Supp. 281 (W. D. Wash.). Although the Board disagrees with many of the decisions, and many of them were rendered before the Supreme Court handed down its opinion in the *Hearst* case, the difference in construing the regulations is too marked to be overlooked. The uniform trend in the decisions has been to the effect that literally read, the regulations seem to reflect a desire not to innovate in the interpretation of employment status.

Security program goes far beyond the limited participation envisaged for the courts by Section 205 (g) of the Act and by general rules for judicial review of administrative determinations. It interposes a serious obstacle to efficient unified administration of the Act by injecting the many district courts into the administration of Title II of the Social Security Act. It censures a responsible finding of fact for no better reason than that it does not find in favor of coverage. If it is allowed to stand as a precedent the Board may be whipsawed for denial of coverage in benefit (entitlement) appeals and for favoring coverage in directing deductions for earnings of $15 or more in covered employment,[15] to the detriment of consistency, uniformity, and responsible administration.

Point II

LaLone was a self-employed individual and the Board properly so found

The facts in this case are that at a time when he was in debt LaLone pooled his insurance business with that of F. S. Barrett and Company. He was installed as the active managing partner and allowed $200 a month out of the profits. The Barrett-LaLone Insurance Agency clearly was not intended to be a mere adjunct of the realty company. *Cf. Gray* v. *Powell,* 314 U. S. 402, 414. Although the Barrett Company financial contribution and its power to demand payment of LaLone's notes at any time after

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[15] Section 203 (d) (1) of the Social Security Act as amended, 42 U. S. C. § 403 (d) (1), requires loss of a monthly benefit for any month in which the individual renders services (in covered employment) for wages of $15 or more.

maturity may have given it a potentially dominant voice in the event of disagreement, it seems clear that, as the referee found, LaLone's interest was that of a co-owner. His sale of his interest for $5,000 in May, 1942, is conclusive that he had a proprietary interest and was not an employee of another from August 1, 1938, to May, 1942.[16] The indicia of a joint adventure are clearly present.

In the face of LaLone's contribution of an established business to the common enterprise, and his proprietary interest in the subject matter which would give rise to profits, it cannot be successfully maintained that Barrett, Sr. and LaLone misconceived the relation[17] and that LaLone was an employee engaged in another's business. The sharing of the profits strongly evidences that LaLone was a joint adventurer or partner along with F. S. Barrett Company.[18] Although no express agreement was ever reached as to losses,[19] the insurance accounts LaLone put into the insurance agency were at the risk of the business. Both parties considered they were to share in losses,

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[16] If he was not in the employ of another he was unable to gain quarters of coverage or quarters for which wages of not less than $50 were paid him. It must appear "to the satisfaction of the Board" that payments for services have been made. Sections 209 (g), (h) of the Act as amended.

[17] Cf. *Schneider* v. *Schneider*, 347 Mo. 102, 146 S. W. (2) 584.

[18] LaLone would have shared even in the profits that were to go to the Barrett Company because those profits would discharge his obligation on the notes.

[19] The absence of an agreement to share losses is not inconsistent with a joint venture. *First Mechanics Bank* v. *Com'r.*, 91 F. (2) 275, 279 (C. C. A. 3); *Eagle Star Ins. Co.* v. *Bean*, 134 F. (2) 755 (C. C. A. 9).

as appears from the fact that LaLone as well as one of the Barretts signed the notes every time money was borrowed by the Barrett-LaLone Insurance Agency (Tr. 51–52). Moreover, no losses were sustained (Tr. 44–45, 48–49). The court nevertheless found (57 F. Supp. 947, 954) that "LaLone had no financial responsibility. If the arrangement had resulted in debt, the Barretts would have paid the debts and would have discharged him."

In violation of the restricted scope of judicial review prescribed by the Supreme Court in a long line of cases (see, *e. g., Federal Trade Comm.* v. *Educational Society,* 302 U. S. 112, 117) the court below paid no attention to the evidence in support of the Board's findings. Instead, it searched the record for evidence to sustain the contentions of the plaintiff, drew its own inferences to establish a departure from the applicable regulations, and put an unprecedented construction on the regulations themselves. On the evidence in the record as distinguished from judicial notice of such items as the worthlessness of accounts in the hands of a delinquent agent and his complete absence of bargaining power, inferences that will often be, and in this case were, at variance with the facts, it may be said that the overwhelming weight of the evidence supported the finding of self-employment. The Social Security Board, by virtue of the Congressional delegation to it of the administration of the benefit provisions, has made hundreds of thousands of coverage determinations and has gained therefrom a specialized knowledge of the variations. Even if the

facts were as consistent with the *employee* hypothesis as the court supposed, it may be doubted that the strictures upon the referee's inexperience in business practices were warranted, or that a relationship so dependent on intention could be categorically characterized as *employment*. The court's ingenious reconstruction of the alleged facts does not exclude the Board's more tenable finding. This "penumbra of the employment relation" did not escape the notice of the Supreme Court in the *Hearst* case (p. 126):

> Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight.

Coverage turns largely upon the interpretation to be given a regulation of the Social Security Board defining "employment." The Board should be considered the best judge of its meaning; its interpretation should not be disregarded by the courts unless clearly erroneous or arbitrary. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294; *N. L. R. B.* v. *J. S. Popper, Inc.,* 113 F. (2) 602 (C. C. A. 3); cf. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375; *Costanzo* v. *Tillinghast,* 287 U. S. 341. "In any case of ambiguity in a regulation established by an administrative officer, his interpretation is entitled to great

weight." *Consolidated Water Power Co.* v. *Bowles,* 146 F. (2) 492, 494 (Em. Ct. App.).

As for the payment of Social Security taxes (totalling $12.00) for two quarters in 1942, the erroneous collection or receipt by Government agents cannot enlarge the scope and application of the tax statute. Much less may it enlarge the scope of the distinct, although related, benefit statute. These payments were made voluntarily and without any assessment or determination by the Bureau of Internal Revenue. For any erroneous payment of taxes the Internal Revenue Code provides a remedy in the form of a claim for refund (26 U. S. C., Int. Rev. Code, § 1421). The Old-Age and Survivors Insurance Program can give credit only for such earnings as constitute wages. Cf *Punke* v. *Murphy,* 267 App. Div. 673, 675, 48 N. Y. Supp. (2) 347, 349. The considerations to be applied by the Board are indicated in Title II of the Act. Significantly, the taxes in question were paid by Barrett-LaLone Insurance Agency, of which LaLone was one of the owners, not by F. S. Barrett & Co. Even after LaLone's death, F. S. Barrett executed and filed with the Social Security Board statements (Form OAC–1001) purporting to show payment of wages to LaLone during 1938–1942, not by F. S. Barrett & Co., but by Barrett-LaLone Insurance Agency (Tr. 92, 95, 99).

The District Court said (57 F. Supp. 947, 950) that the referee

> * * * gave no consideration to the testimony that the two Barretts had the right to control and direct the methods of operation, but

> stressed the testimony that such direction and control was infrequent. In this, the referee ignored the provision in the regulation reading: "In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has a right to do so."

Nothing in the referee's decision warrants any assertion by the court as to the consideration the referee gave to such alleged testimony. The referee's decision contains no reference whatever to frequency or infrequency of any alleged direction or control. Moreover, the evidence shows *consultation among* the Barretts and LaLone, *not* control or direction by the Barretts over LaLone (Tr. 41, 49–50). The evidence is at least as consistent with the theory of consultation between co-partners or joint adventurers, as with the theory of an employer giving instructions to an employee, or the employee consulting his employer for the purpose of obtaining instructions; especially so when read and considered in the light of overwhelming other evidence establishing LaLone's proprietary interest in the insurance business. Because F. S. Barrett & Co. had advanced LaLone money upon his promissory notes, maturing in one year (but not paid until LaLone terminated the venture by selling his insurance accounts to a third party for $5,000), and because LaLone may have deemed it advisable to avoid any serious falling out with the Barretts so long as he wanted to continue the venture, it is possible that the Barretts were in a position to have the final say as to what should be done, but that is no different from the

situation which frequently exists between partners or joint adventurers. In any event, the lower court exceeded its power in substituting its own contrary finding of "control" for the referee's finding of "consultation," rather than control.

The District Court stated (at p. 950) that "The referee gave no weight to the testimony showing that the Barretts furnished the office space out of which LaLone worked," and (p. 954) that "The Barretts furnished the place at which the business was transacted," and that (p. 954) "They furnished him a place to work," and also said that the referee thus "disregarded that portion of the regulation reading: 'Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work to the individual who performs the services.'" The court not only misconstrued the evidence regarding the office space, but even relied upon it as evidencing an employer-employee relationship. In fact, the full evidence regarding the office space supports the referee's decision. The evidence shows that F. S. Barrett & Co. charged the Barrett-LaLone Insurance Agency for rental and telephone (Tr. 45), and that these charges for "office rent and phone rent" were paid currently by the Barrett-LaLone Insurance Agency to F. S. Barrett & Co. (Tr. 51). Thus, it is not true that the "Barretts furnished office space out of which LaLone worked," except in the sense that the venture—Barrett-LaLone Insurance Agency (of which LaLone was a member)—was a lessee or tenant of F. S. Barrett & Co.

The District Court concluded that LaLone "went to work for $200 a month" (p. 953), and that "he worked on a definite salary which he drew regardless of profits" (p. 954). However, his so-called "salary" was not payable and was not paid by F. S. Barrett & Co. nor by the Barretts, nor with funds supplied by them, and he was not on their pay roll. This is obvious from the evidence regarding the only tax returns (Tr. 125–129), and the statements on Form OAC–1001 (Tr. 93, 95, 99), as well as from the evidence that LaLone's "salary" was payable only from profits of the Barrett-LaLone Insurance Agency ("He was to receive $200 a month out of the net profit," Barrett, Sr., testified. Tr. 74. See also Tr. 117), and was actually paid only by checks of the Agency drawn upon its own bank account, derived from insurance premiums (Tr. 51), which had to be signed by LaLone and co-signed by Barrett, Jr., or Barrett, Sr. (Tr. 40–41). Moreover, on several occasions when the Barrett-LaLone Insurance Agency had insufficient funds for LaLone's "salary," the salary of his secretary and other expenses of said Agency, money was borrowed from the bank upon notes of the Barrett-LaLone Insurance Agency, signed by LaLone and one of the Barretts. The loans were repaid out of subsequent profits of said Agency (Tr. 51–52). There is also the significant testimony that on one occasion when the Barrett-LaLone Insurance Agency had insufficient funds to pay "those salaries and those expenditures," F. S. Barrett & Co., "*advanced* the Barrett-LaLone Insurance Agency a small amount of money—maybe

$200 additional" (Tr. 51). All this clearly shows that neither the Barretts nor LaLone considered F. S. Barrett & Co., the corporation, or the Barretts personally, obligated to pay LaLone's "salary," and that LaLone could look only to the profits of the Barrett LaLone Insurance Agency for his "salary", which is in accordance with the unsigned agreement (Tr. 117).

Thus, it is obvious that the court's statements regarding LaLone's "salary" erroneously convey the impression that LaLone's "salary" was paid by F. S. Barrett & Co. or "the Barretts," and "regardless of profits," when as a matter of fact they paid him no salary whatever, and were astute enough to so arrange matters that neither F. S. Barrett & Co., nor the Barretts personally, would be responsible for his "salary." That "salary" was merely a working partner's or coadventurer's allowance or drawings and not a true salary in the sense of an employee's remuneration.

The District Court asserted (p. 950) that "At no place in his decision did the referee discuss the testimony submitted as to the right of the Barretts to terminate the relationship on their own volition. In this the referee ignored the provision of the regulation reading: 'The right to discharge is also an important factor indicating that the person possessing that right is an employer.' " A partnership may always be terminated at the will of any partner, although such termination may be a breach of the agreement, subjecting the withdrawing partner to an action for damages. Assuming, however, that the court referred to a right to terminate the relationship without breach, this,

again, is characteristic of most partnerships and many joint ventures. In this case, moreover, it is not true that the parties were free to terminate the relationship at will. Since the notes LaLone executed to F. S. Barrett & Co. (Tr. 55–56, 120–123), did not mature until one year after date, the court's inference (p. 953) that "They acquired the right to enforce payment of those notes by discontinuing the relationship that was established," is improper. It should be noted that paragraph 8 of the agreement provided that the Barrett-LaLone Insurance Agency should have a minimum term of one year or continue until the repayment of the loan, if that was later, at which time the parties would determine whether to dissolve or to continue the venture (Tr. 118). It is true that the agreement was never formally executed, but the testimony that it represented the actual relationship that was intended, coupled with all the other evidence (e. g., the entry into the relationship, the making of the loan by F. S. Barrett & Co., the execution and delivery by LaLone of one-year notes covering said loan, the relationship for nearly four years, and the circumstances of simultaneous dissolution of the relationship and discharge of the debt by payment from the proceeds of LaLone's sale of his insurance accounts (Tr. 58)) is at least substantial evidence that the relationship was not intended to be terminable at will. Assuming, however, that it was so terminable, that would be at best a factor to be weighed by the referee rather than the court in the light of all circumstances. In consequence, it cannot be said that the referee erred in giving more

weight to other factors clearly indicating that LaLone was a co-owner of the insurance business and not an employee. It was beyond the power of the court to re-evaluate the evidence.

Point III

Findings of the Board supported by substantial evidence are conclusive

Congress has committed the determination of rights to Title II benefits to the Social Security Board. Section 205 (g) of the Social Security Act as amended contains the usual limitation on judicial review of administrative decisions and provides that the "findings of the Board as to any fact, if supported by substantial evidence shall be conclusive." The Board's determination must be sustained if supported by substantial evidence. *Walker* v. *Altmeyer,* 137 F. (2) 531 (C. C. A. 2); *Social Security Board* v. *Warren,* 142 F. (2) 974 (C. C. A. 8); see *Pacific Gas & Electric Co.* v. *S. E. C.,* 127 F. (2) 378, 382 (C. C. A. 9); *Matter of Morton,* 284 N. Y. 167, 30 N. E. (2) 369.

The finality accorded to the Board's findings by the Act extends to its inferences or conclusions so long as they are "reasonably reached upon due consideration" and after a hearing. *Gray* v. *Powell,* 314 U. S. 402; *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251, 257; *Dobson* v. *Com'r.,* 320 U. S. 489, 501–3; *Com'r.* v. *Scottish American Investment Co., Inc.,* 323 U. S. 119; *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111; *Walker* v. *Altmeyer, supra; Social Security Board* v. *Warren, supra.*

The court below approached the problem as one of substituting its own inferences and implications from the evidence for those drawn by the Board. This approach was plain error. *Federal Trade Comm.* v. *Algoma Co.,* 291 U. S. 67, 73. In *Com'r.* v. *Scottish American Investment Co.,* 323 U. S. 119, the Supreme Court reversed the Third Circuit which had said (142 F. (2) 401, 403) "With no real dispute as to the facts, the problem here resolves itself into just what is meant by the language of [Treasury Regulations 101, Article 231 (1)] defining such office or place of business * * *."

The Supreme Court said (323 U. S. at p. 124):

> The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable. It must be cast directly and primarily in support of those made by the Tax Court. If a substantial basis is lacking the appellate court may then indulge in making its own inferences or conclusions or it may remand the case to the Tax Court for further appropriate proceedings. But if such basis is present the process of judicial review is at an end * * * The factual situation is too decisive and too varied from case to case to warrant a great expenditure of appellate court energy in unraveling conflicting factual inferences.

In the present case the Board's inferences were not merely permissible from the evidence; they were compelled. There is no latitude for judicial reexamina-

tion of those inferences and implications by what amounts to a judicial trial *de novo* on the administrative record, particularly under a statute rendering findings of the Board conclusive if supported by substantial evidence.

Courts may not substitute their judgment even where the evidentiary facts are undisputed. In *Gray* v. *Powell,* 314 U. S. 402, 412, the court said:

> Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director * * *. It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action.

In *Walker* v. *Altmeyer,* 137 F. (2) 531 (C. C. A. 2) the district court in a proceeding under Section 205 (g) of the Social Security Act reversed the administrative finding as to employment in a case where the individual, an attorney, continued to perform services after qualifying and so was subject to loss of benefits for months in which he rendered services for wages of $15 or more (Section 203 (d) (1) of the Act as amended, 42 U. S. C. 403 (d) (1). The Court of Appeals, reinstated the Board's decision, saying (pp. 533–534):

> The facts underlying that decision which were found on substantial evidence were, of course, binding upon the district court. That is not the question this appeal raises. The error into which the court fell was not that of making

new and contrary findings but of substituting new and contrary inference of its own from the found facts which led it to reverse the administrative conclusion which had been reached as to the employee status of the plaintiff. That sort of action went beyond the power of the district court to review in such a suit as this. It was the judgment of the administrative body as to an employer-employee relationship rather than that of the court which the statute made effective provided that judgment was based upon conclusions reasonably reached upon due consideration of all relevant issues presented after parties in interest had been given a fair hearing or a fair opportunity to be heard upon the facts and the applicable law. *Gray* v. *Powell,* 314 U. S. 402.

The Supreme Court has consistently given effect to the administrative judgment in cases like that now at bar. But it has on various occasions apparently interchangeably labeled the issue as "fact" (*Virginian Ry.* v. *United States,* 272 U. S. 658, 665), "ultimate fact" (*Dobson* v. *Com'r,* 320 U. S. 489, 501), "ultimate conclusion" or "inference of fact" (*N. L. R. B.* v. *Hearst Publications,* 322 U. S. 11, 130), "factual inferences and conclusions" (*Com'r* v. *Scottish American Inv. Co.,* 323 U. S. 119, 124). More recent pronouncements use the formula of "warrant in the record and a reasonable basis in law" (*N. L. R. B.* v. *Hearst Publications, supra,* at 131) or require that there be a "rational basis" for the administrative conclusion (*Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146). The *Dobson* and *Scottish American* cases indicate that the admin-

istrative decision, whether called "factual inferences and conclusions," "ultimate fact" or "mixed," is not to be treated as one of law unless the elements of a decision can be so separated "as to identify a clear-cut mistake of law," *Dobson* case, 320 U. S. at 502.

The present question of administrative discretion in the field of coverage does not differ materially from that in the *Walker* and *Warren* cases where the issue related to employee status after entitlement. Coverage in those cases had an adverse effect on the individual's right to benefits. In both cases the district courts found for claimants on restrictive interpretations of the Act imposed on the Board as matters of law. In both instances the district courts had to be reversed. The issue in *Gray* v. *Powell,* 314 U. S. 402 was whether, on undisputed facts, the Director of the Bituminous Coal Division correctly concluded that a railroad was a "producer" within the meaning of the Bituminous Coal Act; in *Shields* v. *Utah-Idaho R. R. Co.,* 305 U. S. 177, whether a railroad was an "interurban" within the meaning of the Railway Labor Act; in the *Rochester Telephone* case whether one company was under the "control" of another within the meaning of the Communications Act; and in *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251, whether a claimant was a "member of a crew" within the meaning of the Longshoremen and Harbor Workers Compensation Act.

The establishment by Congress of an administrative authority with power to determine a particular question manifests an intention to rely on the expert judg-

ment of a body "informed by experience." *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111, 130; *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454; *N. L. R. B.* v. *Hoffman & Sons,* 147 F. (2) 679 (C. C. A. 3). Even if it were an available alternative a court is not warranted in imposing on the Social Security Board the construction of employment it favors. See *United States* v. *American Trucking Ass'n,* 310 U. S. 534, 545, fn. 29. The Board in dealing daily with the old-age and survivors insurance system and processing upwards of 2,000,000 claims (See Blachly and Oatman, *Judicial Review of Benefactory Action,* 33 Geo. L. J. 1, 12, fn. 53) has developed a familiarity with the background and objectives of the Act, which cannot well be attained by a court in a single contact with a segment of a problem arising under the Social Security Act, in most instances under appealing circumstances inimical to the formulation of a workable general rule.[20] An integrated national program may be thrown out of gear by a court desirous of liberalizing but inevitably lacking the flexibility, power, and resources to recast the regulations so as to achieve a stable nation-wide equilibrium in a complicated field. Cf. *Rottenberg* v. *United States,* 137 F. (2) 850, 856 (C. C. A. 1) affirmed sub. nom. *Yakus* v. *United States,* 321 U. S. 414; *Henderson* v. *Kimmel,* 47 F. Supp. 635, 645 (D. Kan.).

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[20] The finality accorded the findings of the Board by Section 205 (g) is meaningless if a court may produce a "desirable" result in the light of a particular record, at the risk of disrupting coordinated administration of the tax and benefit provisions of the Old-Age and Survivors Insurance program as a contributory system.

Decisions of the character involved herein go to the heart of the Social Security Act. Affecting the minute details of administration, they belong uniquely to the expert tribunal established in the specialized field. There having been a fair hearing before the Board, an opportunity for plaintiff to present her contentions to the administrative tribunal, application of the Act in a just and reasoned manner, and a rational basis in the evidence to support the Board's conclusion, the court below exceeded its authority in reversing the judgment of the Board in the field entrusted to it by Congress. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146; *Gray* v. *Powell,* 314 U. S. 402; *Dobson* v. *Com'r,* 320 U. S. 489; *Walker* v. *Altmeyer,* 137 F. (2) 531 (C. C. A. 2); *Social Security Board* v. *Warren,* 142 F. (2) 974 (C. C. A. 8).

CONCLUSION

The judgment appealed from clearly exceeded the proper scope of judicial review, is erroneous, and should be reversed with instructions to the district court to enter judgment affirming the decision of the Social Security Board.

Respectfully submitted.

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APPENDIX

Statutes and regulations involved

Title II, Section 202 (c) (1) of the Social Security Act (42 U. S. C. 402 (c) (1)) reads as follows:

Child's insurance benefits

> (c) (1) Every child * * * of an individual who died a fully or currently insured individual (as defined in section 209 (g) and (h)) after December 31, 1939 * * * shall be entitled to receive a child's insurance benefit for each month * * *

Title II, Sections 209 (g) and (h) of the Social Security Act as amended (42 U. S. C. 409 (g), (h)) provide in pertinent part as follows:

> (g) The term "fully insured individual" means any individual with respect to whom it appears to the satisfaction of the Board that
>
> (1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1936, * * * and up to but excluding the quarter in which he * * * died * * *.
>
> As used in this subsection, and in subsection (h) of this section, the term "quarter" and the term "calendar quarter" mean a period of three calendar months ending on March 31, June 30, September 30, or December 31; and the term "quarter of coverage" means a calendar quarter in which the individual has been paid not less than $50 in wages. When the number of quarters specified in paragraph (1) of this subsection is an odd number, for purposes of such paragraph such number shall be reduced by one * * *

> (h) The term "currently insured individual" means any individual with respect to whom it appears to the satisfaction of the Board that he has been paid wages of not less than $50 for each of not less than six of the twelve calendar quarters, immediately preceding the quarter in which he died.

Title II, Sections 209 (a) and (b) of the Social Security Act as amended (42 U. S. C. 409 (a) and (b)) read in pertinent part as follows:

Definitions

> When used in sections 201–209 of this chapter—
>
> (a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *
>
> (b) The term "employment" means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 (b) of this chapter prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either * * *

Employment had been defined in Section 210 (b) of the Social Security Act of August 14, 1935 (49 Stat. 620, 625) as follows:

> (b) The term "employment" means any service, of whatever nature, performed by an employee for his employer * * *

Title II, Section 205 (g) of the Social Security Act as amended (42 U. S. C. 405 (g)) reads as follows:

Any individual, after any final decision of the Board made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia. As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Board or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Board, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations, and the validity of such regulations. The court shall, on motion of the Board, made before it files its answer, remand the case to the Board for further action by the Board, and may, at any time, on good cause shown, order additional evidence to be taken before the Board, and the Board shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify

> or affirm its findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which its action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

Title II, Section 205 (h) of the Social Security Act as amended (42 U. S. C. 4505 (h)) reads as follows:

> (h) The findings and decision of the Board after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Board shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Board, or any officer or employee thereof shall be brought under section 24 of the Judicial Code of the United States to recover on any claim arising under this title.

Section 403.804 of Social Security Board Regulations No. 3 [21] (Part 403, Title 20, Code of Federal Regulations, 1940 Supp.) provides:

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[21] Controlling with respect to services after December 31, 1939. The Board's Regulations No. 2 (Part 402, Title 20, Code of Federal Regulations, Section 402.3) control with respect to services until December, 1939. They contain substantially the same provisions. The first sentence reads: "The relationship between the person for whom services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee."

Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

> If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.
>
> The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.
>
> No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation, but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

Treasury Regulations 91, Article 3, applicable to Title VIII of the Social Security Act (Part 401, Title 20, Code of Federal Regulations, Section 401.3); Treasury Regulations 90, Article 205, applicable to Title IX of the Social Security Act (Part 400, Title 20, Code of Federal Regulations Section 400.205); Treasury Regulations 106, Section 402.204, applicable to chapter 9A of the Internal Revenue Code, Federal Insurance Contributions Act (Part 402, Title 26, Code of Federal Regulations, 1940 Supp.); and Treasury Regulations 107, Section 403.204, applicable to chapter 9C of the Internal Revenue Code, Federal Unemployment Tax Act (Part 403, Title 26, Code of Federal Regulations, 1940 Supp.) define "employees" in substantially the same terms as the corresponding sections of Social Security Board Regulations 2 and 3.

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